# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 13 |


## CITATIONS

Cases:


| | |
|---|---|
| *Anaconda, The,* 164 F. 2d 224 | 8, 9 |
| *Brady* v. *Southern Ry. Co.,* 320 U. S. 476 | 9 |
| *Chickie, The,* 141 F. 2d 80 | 8 |
| *Clifton* v. *United States,* 4 How. 242 | 8 |
| *Continental, The,* 14 Wall. 345 | 12 |
| *D., L. & W. No. 442, The,* 30 F. 2d 250, certiorari denied, 279 U. S. 854 | 12 |
| *Eastchester, The,* 20 F. 2d 357 | 8 |
| *Eugene F. Moran, The* 170 Fed. 928, certiorari denied, 215 U. S. 596 | 10, 11 |
| *Eugene F. Moran, The,* 212 U. S. 466 | 10, 12, 13 |
| *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175 | 7, 10 |
| *Just* v. *Chambers,* 312 U. S. 383 | 7 |
| *Kookaburra, The,* 69 F. 2d 71 | 12 |
| *Louisiana, The,* 3 Wall. 164 | 7 |
| *Mahnich* v. *Southern Steamship Co.,* 321 U. S. 96 | 7 |
| *Milwaukee & St. P. Ry. Co.* v. *Kellogg,* 94 U. S. 469 | 9 |
| *National Licorice Co.* v. *Labor Board,* 309 U. S. 350 | 10 |
| *New York, The,* 175 U. S. 187 | 8 |
| *Pennsylvania, The,* 19 Wall. 125 | 11 |
| *Pensylvania R. Co.* v. *James McWilliams Towing Line,* 277 Fed. 798 | 7 |
| *Sadie, The,* 57 F. 2d 908, affirmed 62 F. 2d 1076 | 12 |
| *Socony No. 123, The,* 78 F. 2d 536 | 12 |
| *Stevens* v. *The White City,* 285 U. S. 195 | 9 |
| *Sturgis* v. *Boyer,* 24 How. 110 | 12 |

# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 351

AMERICAN DREDGING COMPANY, CLAIMANT AND OWNER OF TUGS JAMES N. KNIPE AND ARTHUR N. HERRON, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

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No. 352

AMERICAN DREDGING COMPANY, INDIVIDUALLY AND AS OWNER OF THE DUMP SCOWS NO. 116, NO. 120 AND NO. 122, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 232)

is reported at 77 F. Supp. 264. The opinion of the United States Court of Appeals for the Third Circuit (R. 264) is reported at 175 F. 2d 556.

### JURISDICTION

The judgments of the Court of Appeals were entered on June 27, 1949 (R. 265-266). The petitions for writs of certiorari were filed on September 23, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether there was error in the concurrent findings that petitioner's tugs and scows were liable for negligence in causing the collision with respondent's vessel.

2. Whether petitioner's three scows, because they were unmanned and attached together, were either immune from liability *in rem* or subject to liability only as one.

### STATEMENT

Both of these suits arise from a collision between the steamship *Norwich Victory,* property of the United States, respondent here, and three dump scows owned by petitioner, the American Dredging Company. Petitioner—as claimant and owner of the tugs *James N. Knipe* and *Arthur N. Herron* in No. 351, and individually and as owner of the dump scows in No. 352—seeks review of judgments below which affirm a decree holding the *Norwich Victory,* the scows, and the tugs alike all liable for

negligence in causing the collision. The facts are as follows:

Petitioner maintained a mooring buoy in the Delaware River located approximately opposite Pier 6 of the Philadelphia Navy Yard and 500 feet on the Jersey Side of the channel. At about 8:50 A.M. on January 16, 1947, petitioner's Dump Scow No. 116 was moored to this buoy by petitioner's tug, the *James N. Knipe.* About an hour later, the *Arthur N. Herron,* another of petitioner's tugs, moored petitioner's Dump Scows Nos. 120 and 122 to the same buoy, securing the No. 120 to the outer end and the No. 122 to the port side of the No. 116 (R. 20, 21, 232).

Some three hours later, at about 1 P.M., petitioner's tug the *L. Y. Schermerhorn* observed the three dump scows adrift from their mooring and grounded about 1,000 feet down river from Buoy No. 44, which was located approximately on a line with petitioner's buoy and the Sanitary Dock (R. 20, 22, 232). The *Schermerhorn,* at about 1:30 P.M., conveyed this information by telephone to petitioner's Camden office, and, after trying unsuccessfully to move the scows, proceeded on another assignment at about 2:30 P.M .(R. 23, 232). Some time between 1 and 3 P.M. the tug *Herron* found the tugs aground in the same location at which they were seen by the *Schermerhorn,* and also notified petitioner's Camden office of this situation (R. 23, 232-233). Like the *Schermerhorn* the *Herron* de-

parted, leaving the scows unmoored and unattended in an ebbing tide (R. 4-5, 16).

Shortly after 9 P.M. the tug *J. H. Deinlein,* (owned by another company), after being warned of the presence of the scows by a radio message from the tug *Goheen,* found them floating in mid-channel (R. 226, 233). The captain of the *Deinlein* notified the Navy Yard and the master of one of petitioner's dredges of the scows' location (R. 227-228, 233). He later testified that there were no lights on any of the scows, as did another tug captain who saw the collision (R. 223, 226).

A few minutes after 10 P.M. a Coast Guard picket boat left the Coast Guard Station "with orders to find some drifting barges and report back to the base" (Finding 5, R. 233). Proceeding down the river, this boat sighted the scows when they were about 200 yards away. The scows appeared at first to be wholly without lights; then, when the picket boat moved closer a single very dim light became visible. (R. 233.) Playing its searchlight on the scows, the picket boat circled them for a while, then started back to make its report (R. 233). After proceeding to a point a few hundred feet upstream from the scows, it sighted a steamship moving down the river (R. 141, 233). This was the *Norwich Victory,* which had gotten under way at 10:04 P.M. from a point about 2½ miles upstream and was traveling at a speed of about 12 knots (R. 233-234). The picket boat's light had been seen

some ten minutes earlier from the *Norwich Victory,* but no significance had been attributed to it (R. 234). Now, realizing the possibility of collision, the picket boat sought to give warning by playing its searchlight across the steamship's bow and on the scows (R. 142, 233). But the *Norwich Victory,* holding its course and speed, collided with Scow No. 122, which became impaled on the steamship's bow and was driven into Scow No. 116. The ship and both scows suffered damage. Scow No. 120, though it had been lashed to the other two, escaped injury. (R. 18, 19, 233, 235.)

Libels were filed by both the United States, as owner of the *Norwich Victory,* and the American Dredging Company, as owner of the three scows. The libel of the United States named as respondents, in addition to the Dredging Company and the scows, the tugs *Schermerhorn, Herron,* and *Knipe.* (R. 3-9, 32-35.) Both suits were consolidated, tried on depositions, and submitted upon pleadings and proofs (R. 232).

Holding that the only duty of the *Schermerhorn* upon finding the scows adrift was to inform their owners, the district court absolved this tug of fault (R. 238). The tugs *Herron* and *Knipe,* however, were found to have been negligent in mooring the scows. The court pointed out that the scows had been found adrift within three or four hours of their mooring, that there had been no unusual weather to cause their unmooring, and that petitioner had

"not produced any evidence by the important witnesses who might [have] overcome" the resulting presumption that the tugs had neglected their duty to moor the scows securely (R. 238-239). The court also concluded that the scows, which had been "left unattended, adrift, and inadequately lit in the middle of a busy channel at night," were clearly liable (R. 235). And the *Norwich Victory,* after a review by the court of the testimony of its personnel, was likewise held to have been at fault for failing to maintain a proper lookout and for failing to take earlier precautions against accident (R. 236-238). In this connection, the court rejected petitioner's contention that the negligence of the *Norwich Victory* was such that the fault of the scows could not be regarded as having caused the collision. While the picket boat's light had been misunderstood, the court concluded that "three proper lights on the three scows probably would not have been" (R. 235). Finally, having found negligence on the part of six vessels, the court decreed that they should each bear one-sixth of the joint damages (R. 239-240).

The court below, after a *de novo* consideration, affirmed the conclusions and decree of the district court (R. 264-265).

## ARGUMENT

1. Petitioner attacks in several respects the factual determinations of the courts below. This Court has repeatedly declared, however, that certi-

orari will not issue "merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178, and cases there cited. Here, the evidence has been independently examined by two courts, the inquiry of the court below being *de novo* (R. 264-265). And the concurrent findings of these courts, far from being "plainly without support" (*General Pictures Co.* v. *Electric Co., supra,* at 178), are wholly sustained by the record.[1]

a. In No. 351, petitioner urges (Pet. 13) that when the tugs *Knipe* and *Herron* "had properly and securely fastened their tows to the mooring buoy, they had made such delivery as to relieve the tugs of any liabilities *in rem* for any damages" resulting from the later drifting of the scows. But the quoted language merely contradicts the conclusion of fact, reached by both courts below, that the scows were *not* "properly and securely fastened." Those courts agreed on the well settled proposition that, where, as here, vessels are adrift shortly after their mooring and there are no unforeseeable circumstances of weather or tide to explain the drifting, those responsible for the mooring must overcome the natural inference that they were negligent. *The Louisiana,* 3 Wall. 164, 173-174; *Pennsylvania R. Co.* v. *James McWilliams Towing Line,*

[1] The "two-court rule" applies in admiralty, as in other cases. *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96, 98-99; *Just* v. *Chambers*, 312 U.S. 383, 385.

277 Fed. 798, 799 (C.A. 2); *The Chickie,* 141 F. 2d 80, 82 (C.A. 3); *The Anaconda,* 164 F. 2d 224, 228 C.A. 4). Petitioner, which saw fit to call witnesses from the Coast Guard's picket boat (R. 122-153) and from the passing tug *William Cramp* (R. 214-224), produced not a single witness from among its employees who were in a position to testify as to the manner in which the mooring had been accomplished. Now it contends in effect (No. 351, Pet. 11-13) that its answers to respondent's interrogatories (R. 23-24)—answers supplied on the "knowledge, information and belief" of petitioner's Secretary (R. 24)—stating that Scow No. 116 was still attached to the buoy after the collision, show that the mooring was proper and that the fault lay in the buoy. But this effort to excuse the tugs, given the highly questionable status of petitioner's self-serving answers to interrogatories as "evidence", was reasonably rejected as inadequate. A failure, like the one here, to call witnesses in a position to know the facts has long been recognized to warrant the inference that the testimony of such witnesses would have been unfavorable. *Clifton* v. *United States,* 4 How. 242, 246-247; *The New York,* 175 U. S. 187, 204-205; *The Eastchester,* 20 F. 2d 357 (C.A. 2).[2]

[2] The cases cited by petitioner as being "contrary" to the decision below (No. 351, Pet. 7-8) are shown by petitioner's own discussion of them (Pet. 12, 13, 16) to cast no doubt on the correctness of the conclusion that the tugs were negligent. These cases (1) hold that a tug fulfills its duty when it moors a tow securely in a berth which it reasonably considers safe

b. Equally unimportant and insubstantial is the contention (No. 351, Pet. 17-18) that the negligence of the tugs was not a proximate cause of the collision. Like the question of negligence, the determination of proximate cause is a factual problem. *Milwaukee & St. P. Ry. Co.* v. *Kellogg*, 94 U. S. 469; cf. *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 483. Respondent does not question here the finding that the *Norwich Victory* was negligent. In this case, as in every case where more than one vessel is negligent, it is arguable that the collision could have been avoided by faultless behavior on the part of one. But the contention that the negligence of the *Norwich Victory* was such an intervening factor as to exonerate the tugs was examined and rejected below. Given the circumstances—negligent mooring resulting in the drifting in mid-channel of unlighted scows—this conclusion would hardly appear to require detailed justification here.

c. In No. 352, the specification of errors and argument in the brief supporting the petition (Pet. 8, 9-11) present the contention that, because the initial impact of the collision was between the

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or of which the potential dangers are the responsibility of another; and (2) refuse to hold a tug liable as a bailee for delivering a tow in damaged condition where there is no evidence that the injury is the result of the tug's negligence (*Stevens* v. *The White City*, 285 U.S. 195). In the case at bar, (1) there was no showing that the tugs had moored the scows securely; and (2) the holding that the drifting of the scows "imposed upon the tug the duty of proving that the proper care was exercised * * * [was] merely the application in admiralty of the well known rule of res ipsa loquitur." *The Anaconda*, *supra*, at 228.

*Norwich Victory* and Scow No. 122, Scows No. 116 and No. 120 were improperly held liable for being unlighted, unattended, and adrift.[3] As to the No. 116, this argument seems particularly ill-conceived. This scow was damaged in the collision (R. 235). Petitioner sought recovery for these damages (R. 35), which obviously had to be added to the total to be apportioned. The damages to the No. 116 flowed directly from the fact that it was negligently permitted by petitioner to drift unattended for some nine hours prior to the collision.

Apart from this objection, however, petitioner concedes (Pet. 9-10) that the Scows No. 116 and 120 were under a statutory duty to carry lights, and does not question here the finding that they were unlighted. The district court expressly considered this Court's direction to the Court of Appeals in *The Eugene F. Moran,* 212 U. S. 466, 476, to examine the question "whether the duty to give warning by a light was imposed upon [a scow tied to another] for any other purpose than to prevent collision with itself." And it concluded "that the duty imposed upon each of these Scows was, under the circumstances of the instant case, to protect all three from collision with any one of them." (R. 240.) In *The Eugene F. Moran, supra,* the Court of Ap-

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[3] Since "the supporting brief is not a part of the petition, at least for the purpose of stating the questions on which review is sought" (*General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 178), it would appear to be doubtful whether this question is properly presented for review. Cf. *National Licorice Co.* v. *Labor Board,* 309 U.S. 350, 357.

peals, considering the same problem on remand, reached the same conclusion, 170 Fed. 928 (C.A. 2), and this Court denied certiorari, 215 U. S. 596. The identical result below presents equally slight basis for review. Where, as here, vessels "at the time of a collision [are] in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster." *The Pennsylvania,* 19 Wall. 125, 136.

2. Petitioner contends, finally, that, since the scows had no crews and were tied together, *in rem* liability could not attach to them at all; or if it could, that the three scows should be counted as one for the purpose of assessing their liability. The first of these suggestions —no *in rem* liability—petitioner supports by discussing at length cases where towed vessels were in charge of tugs and where the negligence of the tugs resulted in injury to third parties. In this case, however, apart from the initial negligence of the tugs, the scows were permitted by petitioner to drift, unlighted and unattended, for eight or nine hours. The scows were "negligent" in the only sense in which the admiralty ever condemns an inanimate vessel as negligent; namely, in that those responsible for them failed to exercise due care to avoid their injuring others. This Court long ago laid down the principle that "vessels are held liable for damage occasioned by collision * * * on ac-

count of the culpable neglect or complicity, direct or indirect, of their owners * * *." *The Continental,* 14 Wall. 345, 354; *Sturgis* v. *Boyer,* 24 How. 110, 123. Accordingly, where owners or their agents have been negligent in permitting their vessel to injure others, the fact that it was unmanned at the time has not prevented the imposition upon it of *in rem* liability for resulting injuries to other vessels. *The D., L. & W. No. 442,* 30 F. 2d 250 (C.A. 2), certiorari denied, 279 U. S. 854; *The Sadie,* 57 F. 2d 908 (S.D.N.Y.), affirmed, 62 F. 2d 1076 (C.A. 2). Any other result would make the personification of a vessel as a "wrongdoer" a painful artificiality wholly divorced from its essential practical purpose as a security device.

Like the faulty analysis of *in rem* liability upon which it is based, petitioner's contention that the three scows should be counted as one in apportioning liability is without merit. This contention, though urged by petitioner as making this "a case of extraordinary and exceptional circumstances" (No. 352, Pet. 7), is actually refuted by this Court's decision in the precisely analogous case of *The Eugene F. Moran,* 212 U. S. 466. (And see *The Kookaburra,* 69 F. 2d 71 (C.A. 2); *The Socony No. 123,* 78 F. 2d 536 (C.A. 2).) There, two scows, tied together, were each held separately liable for failure to carry proper lights. The very argument urged here—that vessels tied together should be treated as a unit—was rejected. 212 U. S. at 475.

As this Court pointed out, "If the second scow had been owned by another it would have had to pay its share." *Ibid.* Nor was the result determined by the fact that the scows were manned. In that case, as in this one, the point of importance was that the faults of the scows in failing to show lights "were several." *Ibid.*

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. It is respectfully submitted that the petitions for writs of certiorari, which raise no question of general importance, should be denied.

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